IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 816

ERNEST NEWTON KALB,

Petitioner,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN,

Respondents.

RESPONDENTS' BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
STATEMENT	1
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. It Was Within the Inherent Power of the District Court to Preserve the Status Quo, Both as to the Parties Before the Court and the Property Involved, Pending This Appeal, by Restraining the Appellant from Entering into and Upon the Farm in Question	6
(A) The District Court Had the Power to Issue a Restraining Order Pending this Appeal	6
(B) The Power of Bankruptcy Courts to Grant Injunctional Relief is Definite	7
II. The Contention of the Petitioner That the Dismissal of These Proceedings Deprived Him of His Opportunity to Invoke the Benefits of Subsection (S) and Thus Deprived Him of His Property Without Due Process is Untenable	9
(A) A Debtor, Under Section 75, May Amend His Petition at Any Time	9
(B) The Contention of the Petitioner That the Dismissal of His Petition Deprived Him of the Benefits of Subsection (S) is Without Support in the Record	10
(C) Notice of Dismissal Need Not be Given	11
III. The Petitioner's Petition Was Properly Dismissed in View of His Failure to Make Timely Application for the Benefits of Subsection (S) of Section 75	15

Page

(A) The Contention of the Petitioner That His Proceedings Were Dismissed Because He Had Been Dispossessed Cannot be Established Except by Impeachment of the Records of the District Court 15

(B) The Failure of the Petitioner to Make and File a Written Offer to His Creditors Required the Dismissal of the Petition 16

(C) The Benefits of Subsection (S) Will be Extended Only to Those Debtors Who Make Application Therefor 18

IV. The Dismissal of Petitioner's Proceedings by the District Court is Binding and Conclusive and the Doctrine of Res Adjudicata Applies.... 19

V. The Appeal From the Order of the District Court Was Not Taken Within the Time Prescribed by the Bankruptcy Act..... 30

(A) The Time for Appeal From the Order of March 17, 1936, Expired Within 40 Days After Entry Thereof 30

(B) The Appeal From the Order of April 16, 1940, in Effect Seeks a Review of the Prior Order and Should be Dismissed..... 31

CONCLUSION 34

Table of Cases Cited

Archibald, In Re, 14 F. Supp. 437..... 25

Ballard, In Re, 10 F. Supp. 549 17

Bartels v. John Hancock Mutual Life Insurance Company, 84 L. Ed. 154 16

	Page
Cresap, In Re, 99 F. 2d 722	18
Gratiot County State Bank v. D. Lloyd Johnson, Trustee, 249 U.S. 246, 39 Sup. Ct. Rep. 263	12
Henderson, In Re, 100 F. 2d 820	27
Irving-Austin Building Corporation, In Re, 96 F. 2d 905	33
Kalb v. Feuerstein, 291 N.W. 840	2
Kalb v. Feuerstein, et al., 308 U.S. 433	2, 8, 12
Kalb v. Luce, 291 N.W. 841	2
Marcy v. Miller, 94 F. 2d 611	33
Massey v. Farmers & Merchants National Bank & Trust Company, 94 F. 2d 526	12
McMurray, In Re, 8 F. Supp. 449	18
McWilliams v. Blackard, 96 F. 2d 43	23
Mintz v. Lester, 95 F. 2d 590	32
Oyler, In Re, 20 F. Supp. 595	21
Union Joint Stock Land Bank v. Byerly, 310 U.S. 1, 60 S.C. 773	29
Vater, In Re, 14 F. Supp. 631	17
Wilcons v. Penn Mutual Life Insurance Company, 104 F. 2d 456	19

Statutes and Text Books Cited

Bankruptcy Act, Section 2 (A)	7
Bankruptcy Act, Section 2, Subs. 21 (B)	8

	Page
Bankruptcy Act, Section 25 (A)	38
1 Remington, 4th Ed. 47	11
1 Remington, 4th Ed. 50	11
15 Ruling Case Law 633	12
Title 11, U.S.C.A. 48 (a)	38

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STATEMENT

The statement of facts contained in petitioner's brief and in the opinion of the District Court (R. 22, 26) is substantially complete.

However, counsel for the respondents desires to point out certain matters involved in this appeal in addition to the statements above referred to.

The petition of the appellant herein was first dismissed on June 27, 1935, upon the report of the conciliation commissioner, which set forth, among other things, that, "there was no amended petition filed in this matter". (R. 8-9).

It was, and as we believe, erroneously reinstated on September 6, 1935. (R. 10).

On March 11, 1936, the conciliation commissioner made his report, reciting, "that the applicant failed to make any offer to creditors and failed to file an amended petition, and, therefore, this conciliation commissioner recommends that this petition be dismissed". (R. 10, 11). Following the filing of this report, the District Judge, embodying in his order the language quoted above, dismissed the proceedings. (R. 11).

The conciliation commissioner (affidavit of conciliation commissioner, R. 21, 22), pursuant to instructions from the District Court, required that all offers by debtors to creditors under Section 75 be submitted in writing. The petitioner was so informed. The petitioner was also advised of the necessity of filing an amended petition in bankruptcy. (Affidavit of conciliation commissioner, R. 21, 22).

In October, 1937, two actions were instituted by the petitioner in the state courts of Wisconsin, one in equity, seeking to recover possession of the petitioner's farm; and the other in tort for damages. (R. 14).

The defendants demurred to the complaints, and after successive appeals to the Wisconsin Supreme Court and the Supreme Court of the United States, both cases were remanded to the Circuit Court of Walworth County, Wisconsin, for trial. (See *Kalb v. Feuerstein,* 291 N.W. 840; *Kalb v. Luce,* 291 N.W. 841; *Kalb v. Feuerstein,* et al, 308 U.S. 433).

The action sounding in tort was tried and disposed of in December, 1940, and resulted in a judgment dismissing the plaintiff's complaint on the merits as to all the defendants therein.

On February 28, 1940, the petitioner filed a petition for reinstatement of his proceedings under Section 75 of the Bankruptcy Act (R. 12), and on March 18, 1940, filed an amended petition asking for vacation of the order of dismissal entered in the District Court on March 17, 1936. (R. 13, 17).

After oral arguments had been had and counsel for the respective parties had been instructed to file written briefs, and prior to a decision by the District Judge, the petitioner went upon the premises in question and began to plow up certain clover and timothy hay planted thereon. Thereupon, counsel for the respondents moved the Court for an order restraining the petitioner from plowing up or destroying the crops on the premises in question, pending the decision of the Court. (R. 24, first paragraph).

After the court had rendered its decision refusing to vacate the order of dismissal and refusing to reinstate the proceedings under Section 75, the respondents gave notice to the petitioner of a motion to confirm the sheriff's report of sale in the foreclosure proceedings.

Thereupon, the petitioner moved the District Court for an order enjoining the respondents from proceeding with confirmation of the sheriff's report of sale, pending the perfecting of an appeal from the decision of the District Court.

The respondents thereupon renewed their original motion, and by oral stipulation it was agreed that both motions might be granted.

Counsel for the respondents, believing that the District Court was right in preserving the status quo, has not appealed from the order restraining the respondents from proceeding further in the state courts, and hence, that portion of the proceedings does not appear in the record.

At this time, therefore, the respondents are enjoining from proceeding with confirmation of the sheriff's report of sale, and the petitioner is enjoined from entering upon the farm that forms the subject matter of the litigation, until this appeal is ultimately determined. (R. 28).

SUMMARY OF ARGUMENT

I.

The District Court possessed the inherent power to preserve the status quo, both as to the parties and the property involved, pending the petitioner's appeal from the order denying reinstatement of the debtor's proceedings. Especially is this true in the light of the broad powers conferred upon bankruptcy courts.

II.

(a) The petitioner was not denied the opportunity of invoking the benefits of Subsection (S) of Section 75, but rather waived those benefits either by inaction or by intention.

(b) The contention of the petitioner that he did not know the proceedings had been dismissed is futile, inasmuch as the record shows that he made no effort to prosecute those proceedings for a period of four (4) years.

(c) In any event, bankruptcy proceedings are in rem and not in personam, and direct notice to the parties having an interest in the subject matter of the litigation is not necessary. The rule that all creditors and lien claimants are required to take notice of the various steps in the proceedings applies with equal force to the debtor.

III.

(a) The failure of the petitioner to make application within a reasonable time to be afforded the benefits of Subsection (S) of Section 75, rendered the dismissal of the proceedings necessary. The claim that the proceedings were dismissed because the petitioner had been dispossessed is entirely without support.

(b) The failure of the petitioner to make and file a proposal to his creditors justified the dismissal of the proceedings in the District Court.

(c) The benefits provided by Subsection (S) are optional with the debtor and will only be extended to those who make timely application therefor.

IV.

The order of dismissal of the debtor's proceedings was a final order, and right or wrong, became final and binding in the absence of an appeal taken within the time fixed by law. The validity of the order of dismissal cannot be collaterally attacked.

V.

(a) The appeal from the order of dismissal entered March 17, 1936, should be dismissed because it was not taken within the time fixed by law.

(b) The appeal from the order of April 16, 1940, should also be dismissed because, in practical effect, it is merely an attempt to avoid the statute fixing the time within which an appeal may be taken by moving the vacation of an order after the time for appeal therefrom has expired, and then appealing from the order denying the motion to vacate.

ARGUMENT

I. It Was Within the Inherent Power of the District Court to Preserve the Status Quo, Both as to the Parties Before the Court and the Property Involved, Pending This Appeal, by Restraining the Appellant from Entering Into and Upon the Farm in Question.

A. The District Court had the power to issue a restraining order pending this appeal.

Counsel for the petitioner has devoted a substantial portion of his brief (Pages 15 to 17, incl.) to a discussion of the lack of power in the district court to preserve the status quo pending the outcome of this appeal.

It is true, as stated at Page 15 of the petitioner's brief, that, when the District Court rendered its decision refusing to reinstate the petition, the District Judge also denied the respondents' motion for an order restraining the petitioner from entering into and upon the farm in question. This, upon the ground that the court, having refused to reinstate the petition, had no further jurisdiction.

But on the day following the filing of the formal order refusing to reinstate the proceedings, the petitioner moved

the District Court for an order restraining the respondents from proceeding to the confirmation of the sheriff's sale in the state court. The respondents thereupon orally moved for an order restraining the petitioner from disturbing possession of the farm pending the final result of this appeal. Both orders were entered pursuant to an oral stipulation between the parties.

Counsel for the petitioner contends in his brief (Pages 16 and 17) that the District Court had no power to enter the order restraining the petitioner, yet it was the petitioner who sought the jurisdiction of the District Court to obtain injunctive relief for his own protection and benefit. Having obtained that relief, he now takes the position that the court had no power or authority to grant the relief he himself asked for.

The petitioner, having invoked the jurisdiction of the District Court, certainly cannot now take the illogical position that the court had no authority or jurisdiction.

B. The power of bankruptcy courts to grant injunctional relief is definite.

At Page 16 of the petitioner's brief it is contended that no authority is contained in Section 75 granting to the bankruptcy court the power to grant injunctional relief. It is true that Section 75 contains no such grant of power in express language; but Section 75 is a part of the Bankruptcy Act and cases brought under that section must be considered in the light of the entire Act.

Section 2(a) of the Bankruptcy Act provides:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now estab-

> lished or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act * * * ."

And Section 2, Subsection 21 (b) provides:

> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

It is submitted, therefore, that in view of the broad general powers conferred upon the bankruptcy courts that the District Court had the jurisdiction and authority necessary to issue the injunctional order complained of, particularly in view of the fact that the petitioner himself invoked the jurisdiction of the court for, and obtained, a similar order.

Nor can it reasonably be said, as claimed by the petitioner, that the restraining order herein is a nullification of the decision of this Court in *Kalb v. Feuerstein,* 308 U.S. 433. That case had its inception in an action commenced in the state court. It was before this court on demurrer, and the sole question was whether the complaint on its face stated a cause of action. This Court held that a cause of action was stated and remanded the proceedings for trial on the merits.

The question here involved was not in issue in that controversy, and except as the decision in that case pronounced several general and specific rules of law pertaining to Section 75, it is not controlling here.

The injunctional order was entered for the sole and only purpose of preserving the status quo until the rights of all parties could be determined and until the petitioner's appeal could be heard. The issuance of that order and the companion order was well within the inherent power of the court to make.

II. The Contention of the Petitioner That the Dismissal of These Proceedings Deprived Him of His Opportunity to Invoke the Benefits of Subsection (S) and Thus Deprived Him of His Property Without Due Process is Untenable.

A. A debtor, under Section 75, may amend his petition at any time.

It is contended by the petitioner that he was, by the dismissal of these proceedings, deprived of his opportunity to invoke the benefits of Subsection (S) and thus deprived of his property without due process. (Petitioner's brief, page 27).

It is clear from a reading of the provisions of Subsection (S) that an amended petition under that subsection could have been filed by the petitioner at any time when it appeared that the consent of his creditors to a plan of compromise could not be obtained.

Therefore, an amended petition asking for an adjudication under Subsection (S) could have been filed on May 6, 1935, when, as the commissioner's report shows, attempts at conciliation failed, or at any time subsequent thereto and prior to the date of dismissal on June 27, 1935; or referring to the reinstated petition, at any time after January 22, 1936, when, according to the commissioner's report, no creditors appeared.

Nowhere in Section 75 can there be found any provision, express or implied, which supports the conclusion that the debtor cannot amend his petition until after the commissioner has filed his report showing that conciliation has failed.

Nor is there any provision in Section 75 which requires or permits the pendency of proceedings such as these for an interminable period.

Two courses are open to a debtor who invokes the protection of Section 75 and fails to reach an agreement with his creditors: He may amend his petition, ask to be adjudicated a bankrupt, and then avail himself of the provisions of Subsection (S); or he may, as did this debtor, abandon his proceedings and waive the benefits of Subsection (S). It is his privilege to elect whether or not to become a bankrupt. If he fails to so elect, the court has no alternative but to dismiss the proceedings.

B. The contention of the petitioner that the dismissal of his petition deprived him of the benefits of Subsection (S) is without support in the record.

It is submitted that the dismissal of the petitioner's proceedings did not deprive him of any valuable right, and that the dismissal is not the cause of the petitioner's present difficulties.

It is claimed by the petitioner at Page 32 of his brief, third paragraph, that he had no notice of the dismissal of the proceedings in the District Court. The record does not so state. His petition for reinstatement only alleges that the proceedings were dismissed *without notice,* which is a vastly different thing than a statement that the petitioner *did not know the proceedings had been dismissed.*

But as pointed out by the Circuit Court of Appeals (Opinion—R. 43), if the petitioner did not know his proceedings had been dismissed, how can he excuse his failure to act in connection therewith, or to file his amended petition under Subsection (S) for a period of four (4) years after his efforts at conciliation had failed.

The answer is obvious. For some reason known to himself, he chose to litigate the matter in the state courts

and to abandon the proceedings under Section 75. No other conclusion can reasonably be arrived at.

Counsel for the petitioner infers in his brief that it was necessary for the petitioner to determine the matter of possession in the state court before proceeding further in the federal court. Such an inference affords no excuse to the petitioner for his failure to take any steps in any court, state or federal, from March 12, 1936, when he was evicted, until October, 1937, when proceedings were started in the state court.

Nor can it be reasonably claimed that the petitioner could ignore and neglect the proceedings which he himself had instituted, for a period of four (4) years and then be entitled to the benefits of Subsection (S). We believe that one who institutes proceedings of this character owes a duty to himself and to the court to proceed with some degree of promptitude.

C. Notice of dismissal need not be given.

No notice of dismissal need be given to the debtor, for the debtor, by the filing of his original petition, invoked the jurisdiction of the Bankruptcy Court and placed himself and his property under its protecting mantle.

> "Bankruptcy proceedings are in rem and not in personam."
>
> *1 Remington,* 4th Ed. 47, Para. 21.
>
> "Thus all persons are bound thereby as to all proceedings that are strictly bankruptcy proceedings."
>
> *1 Remington,* 4th Ed. 50, Para. 22.
>
> "It is a distinguishing characteristic of judgments in rem that direct notice to the parties having inter-

ests in the subject matter of the litigation is not essential to their validity."

15 R.C.L. 633, Para. 76.

"Like other judgments in rem, an adjudication in bankruptcy is res adjudicata as to the facts or as to the subsidiary questions of law, as between those who were parties or privies to the proceedings."

Gratiot County State Bank v. D. Lloyd Johnson, Trustee, 249 U.S. 246, 63 L.Ed. 587, 39 Sup. Ct. Rep. 263.

This Court, in its opinion in *Kalb v. Feuerstein,* 308 U.S. 433, held that the mere filing of a petition under Section 75 ousted the state court of all jurisdiction *without notice,* and held that such a construction was consistent with the Constitutional guaranty of "due process".

That no notice of the filing of the original petition is necessary, is consistent with the theory that the proceedings being in rem, all the world is required to take notice of such filing and of all subsequent steps in the proceedings.

And certainly it must follow that if creditors and lien claimants are required to take notice of the various steps in the proceedings, such a rule must apply with equal force to the debtor. He instituted the proceedings, he sought the protective jurisdiction of the Bankruptcy Court. The burden of prosecuting the proceedings to completion is his. The debtor alone can invoke the benefits of Subsection (S).

We think the language of the court in *Massey v. Farmers & Merchants National Bank & Trust Company,* 94 F. 2d, 526, at page 530, is controlling on this question. The court said in part:

"The debtor charges that it was error on the part of the court to affirm the findings of the conciliation

commissioner and dismiss the petition in case No. 4292 without notice to her. It would no doubt have been proper practice upon the filing of the report to have notified the debtor to show cause on or before a certain date, if any she had, why the report should not be approved and the debtor's petition dismissed. But we cannot say that it was error to follow the course which the court pursued. *The filing of the report of the commissioner, of which the debtor was bound to take notice, took place on October 15, 1937, and it was shown therein that the debtor's petition had not been filed in good faith. Thereafter twenty-one days elapsed (during which interval the debtor took no exceptions to the report) before the report was accepted and the petition dismissed;* and in the meantime, the order restraining the bank from taking action upon its claims remained in effect. The court was therefore justified in putting an end to the proceeding in the absence of any controlling statute or rule of court to the contrary." (It is significant to note that a writ of certiorari to the Supreme Court of the United States in the above matter was dismissed. 58 S. Ct. 761, 303 U.S. 665, 82 L.Ed. 1122). (See, also, In Re Hunderson, 100 F. 2d 820). (Italics ours).

The petitioner has not been denied "due process" in this instance any more than an ordinary bankrupt who, through inadvertence or neglect, fails to make application for discharge, or a litigant in a court of law whose proceedings are dismissed for failure to prosecute.

Nor has he been denied "due process" any more than have the respondents whose proceedings in the state court were suspended without notice, and without any opportunity being afforded them to appear in opposition to the institution of the original proceedings, or the reinstatement of the petition once dismissed.

The petitioner here seems to have taken the position that, having once filed his petition, his duty to the court and to himself was ended, and that he could sit idly by to the prejudice of his creditors and use the process of the court as a means of delay.

An examination of the record best demonstrates the attitude of the petitioner toward the District Court and the proceedings therein.

Although his original petition was filed on October 2, 1934, and although he was unable to reach an agreement with his creditors, no order of dismissal was entered until June 27, 1935, at which time an order dismissing the petition was entered, based upon the commissioner's report which recited that, "There was no amended petition filed in this matter". (R. 8).

The proceedings were, as we contend, erroneously reinstated without notice to the respondents on September 6, 1935. (R. 10).

From that date until March 11, 1936, the petitioner failed to make any offer to creditors as a part of the proceedings before the commissioner and failed to file an amended petition as required by Subsection (S). (See report of conciliation commissioner at R. 10. Also, affidavit of conciliation commissioner at R. 12).

Counsel for the petitioner contends that during that period the petitioner was conducting private negotiations with his creditors. This, of course, was his privilege and one which he might well have exercised without instituting proceedings under Section 75.

We submit that under the admitted facts, the commissioner and the court could, and perforce were compelled to, arrive at only one conclusion—that the petitioner had abandoned his proceedings.

III. The Petitioner's Petition Was Properly Dismissed in View of His Failure to Make Timely Application for the Benefits of Subsection (S) of Section 75.

A. The contention of the petitioner that his proceedings were dismissed because he had been dispossessed cannot be established except by impeachment of the records of the District Court.

At Page 22 and Page 26 of the petitioner's brief, it is inferred that some concealed or unexplained reason existed for the dismissal of the petitioner's proceedings. The respondents submit that the record is clear, concise, and leaves no room for speculation. It should first be observed that the commissioner's report was dated March 11, 1936. At that time Kalb was still in possession of his farm.

Although the order of dismissal was not entered until March 17, 1936, after eviction had taken place, the statement that the real reason for dismissal was that the petitioner had been completely divested of his property (petitioner's brief, page 26) is a rash and entirely unwarranted conclusion.

The report is clear and concise, setting forth that no offer had been made to creditors, and that no amended petition had been filed. (R. 10). Upon that report and for those reasons the order of dismissal was entered. (R. 11).

Likewise, the statement that it would have been a vain proceeding to have applied to the district court for relief under Subsection (S) is entirely erroneous. As a matter of fact, the schedules filed by the petitioner in this

matter listed real and personal property other than that covered by the Feuerstein mortgage. The petitioner was entitled, if he desired, to have that property administered in the Bankruptcy Court.

Nor would there have been any duplication of litigation. As a matter of record, the proceedings in the state court were not instituted until September, 1937, nearly eighteen months after the petitioner's eviction and the dismissal of these proceedings. Those proceedings are still pending in the courts of Wisconsin, awaiting determination by the Circuit Court of Walworth County.

Precisely nothing has been decided in the state court proceedings as yet as to the occupancy of the farm, except that the filing of a petition under Section 75 is an ouster of jurisdiction of the state courts as to any proceedings therein pending affecting the petitioner or his property. The defenses of laches, estoppel, etc., are still available.

B. The failure of the petitioner to make and file a written offer to his creditors required the dismissal of the petition.

We advert at this point very briefly to the case of *Bartels v. John Hancock Mutual Life Insurance Company,* 84 L.Ed. 176, 308 U.S. 180.

In that case, this court held that where the debtor, after his proposed plan is rejected by his creditors, seasonably amends his petition and seeks to avail himself of the provisions of Subsection (S), he is entitled to proceed under that Subsection. And the fact that the plan offered was not feasible, or that no possibility of the financial rehabilitation of the debtor existed, is not grounds for dismissal of the proceedings.

But that case is of no value in the consideration of this matter, for in this case the petitioner failed to take the first step in the necessary procedure, even though he had nearly two years in which to do so.

That the Act requires the filing of a proposal to creditors is beyond question.

In the case of *In Re Vater,* 14 F. Supp. 631, at Page 632, the court said:

> "It seems to be clear and in harmony with the rulings of most of the courts which have considered the matter that before a farmer is entitled to amend his petition in order to avail himself of Subsection (S), it is necessary that he shall have made a proposal to his creditors for composition and extension under Subsections (A) to (R) * * * The theory of the law under which a good faith proposal is made a condition precedent to the relief provided by Subsection (S), presupposes a fair opportunity to creditors to weigh and consider the debtor's voluntary offer in comparison with the alternative remedy afforded such debtor under the provisions of Subsection (S)."

And in *In Re Ballard,* 10 F. Supp. 549, where an amended petition under Section 75 (S) was dismissed, the court said:

> "The petitioner apparently is laboring under a misapprehension of the law. The Bankruptcy Act, Section 75, requires the consent of only the creditors whose claims have been filed and allowed to the acceptance of a composition or extension. Only two creditors have filed claims. It does not appear that the petitioner is unable to obtain their consent.
>
> Moreover, it is clear that under the language of Section 75 (S), the farmer must either have actually proposed a plan which the creditors have not accepted or he must feel aggrieved by one they have accepted. The petition does not disclose such facts."

And in *In Re McMurray,* 8 F. Supp. 449, at page 453, the court said:

> "Whether a debtor can get his creditors to accept his proposal should, if possible, be decided at the first meeting, and, outside of exceptional cases, it should be done at this meeting or at least within an adjourned meeting of not less than ten days. *These proceedings contemplate a prompt offer of compromise or extension by the debtor to pay his debts. This must be undertaken expeditiously and proceeded with diligence.* The debtor should not be kept out of his property nor the creditor deprived of his rights to enforce his lien for any longer time than is necessary for a probable acceptance of the proposal of the debtor. When apparent that this cannot be promptly done, the proceedings should on motion be dismissed unless the debtor asks to be adjudged a bankrupt."

C. The benefits of Subsection (S) will be extended only to those debtors who make application therefor.

In the matter of *In Re Cresap,* 99 F. 2d 722, at Page 727, the Circuit Court of Appeals for the Seventh District, by Sparks, Circuit Judge, said:

> "It is quite true that amended Subsection (N), 11 U.S.C.A., Para. 203 (N), subjects the farmer and all his property, for the purposes of Section 75, to the exclusive jurisdiction of the court from the time the farmer's petition for composition and extension is filed. *A reasonable construction of that subsection would continue that jurisdiction for the purpose of permitting the debtor to ask for an adjudication if he failed in the composition, providing he asked for it within a reasonable time and before his reinstated petition for composition was rightfully dismissed.* Subsection (N) confers jurisdiction of the property for

the purposes of the Act. The two purposes of the Act are to extend to the farmer the unmolested right to effect a composition of his debts, and upon his failure in that respect it further extends to him, if he asks for it, the right to be ajudicated a bankrupt under Subsection (S) and to secure its benefits with respect to rehabilitation. *These rights were fully accorded to him, and the purposes of Subsection (N) were accomplished. He admittedly failed to effect a composition, and he failed to ask for the benefits of Subsection (S) until long after he had permitted his period of redemption to expire,* and after the expiration of repeated notices of the court to exercise his option to ask for an adjudication. Thereupon the court made the order complained of and for the several reasons hereinbefore discussed. We think there was no error.

The order of the District Court is affirmed." (Italics ours).

IV. The Dismissal of Petitioner's Proceedings by the District Court is Binding and Conclusive and the Doctrine of Res Adjudicata Applies.

It is the contention of counsel for the respondents that the petitioner, having filed his application for relief under Section 75, and having been given ample time in which to avail himself of its benefits, reinstatement of his petition was properly denied, in view of the fact that the proceedings were dismissed by the Federal Court for cause. We respectfully submit that the great weight of authority supports us in this contention.

In the case of *Wilcons v. Penn Mutual Life Insurance Company,* 104 F. 2d 456, at Page 458, the debtor filed his petition under Section 75 on the 13th day of January, 1936. The first meeting of the creditors was held

on the 25th day of February, 1936, and a report showing non-acceptance of the debtor's plan was filed on May 4, 1936. On May 29, 1936, the proceedings were dismissed.

On appeal, the Court held that where the plan of compromise is rejected, no time need be set in which to apply for confirmation, as provided by General Order No. 50 (4), as the setting of a time in which to apply for confirmation under those circumstances would be a mere gesture. The court refused to permit the debtor to file under Subsection (S), saying in part as follows:

> "Subsections (A) to (R) of the Act concern themselves with compositions and extensions. The debtor petitioned for relief under their terms. Where a debtor filed his petition under these provisions but is unable to secure acceptance of a proposed plan of composition or extension the proceedings has spent its force, it can accomplish nothing more and should be dismissed unless the debtor seasonably files a petition or an amendment to his original petition asking to be adjudged as a bankrupt under Subsection (S), as amended by the Act of August 28, 1935, 49 Stat. 942. That provision expressly authorizes the filing of such a petition in the event the debtor fails to obtain the acceptance of his proposed plan of composition or extension, as the case may be. It is silent in respect to the time within which such petition or amendment shall be filed. But General Order in Bankruptcy number 50 (4), 11 U.S.C.A. following Section 53, provides that if a farmer has not applied for confirmation within such reasonable time as has been fixed therefor, which shall be not later than three months after the date of the first meeting of creditors, unless the time has been extended in the manner provided, the commissioner shall report the facts to the court and the court shall thereupon dismiss the proceedings. In addition, Rule 41 of the

court below provides that a farmer who fails to obtain acceptance of a proposal for composition or extension may at any time within three months after the date of the first meeting of creditors, amend his petition or answer and ask to be adjudged a bankrupt. Here the debtor did not make application for confirmation within the time thus allowed. In the very nature of things, he could not do so because he failed to secure the requisite acceptance of such plan. The conciliation commissioner reported that the plan of extension was not accepted. The three months' period after the first meeting of creditors expired May 25, 1936. No other plan for extension had been proposed; no plan for composition had been offered; and no petition had been filed to be adjudged a bankrupt under Subsection (S). Indeed no petition for adjudication under Subsection (S) has ever been filed. The debtor has not yet sought in any manner to obtain benefits under that provision. He still asserts rights under Subsections (A) to (R). The fact that the insurance companies sought dismissal of the proceedings as to themselves and the lands involved did not absolve the debtor from the duty to secure acceptance of some proposed plan of composition or extension, or to petition within the authorized time to be adjudged a bankrupt under Subsection (S). He did neither. He thus suffered his proceeding under Subsections (A) to (R) to spend its force, and he failed seasonably to invoke Subsection (S). Manifestly he has not been wrongfully denied any right which the statute accords him."

In the case of *In Re Oyler,* 20 F. Supp. 595, at Page 597, the matter came before the court on the motion of a creditor for dismissal because of the failure of the debtor to make a bona fide offer of composition or extension of his debts. The motion was granted. We quote in extenso from the court's opinion, as we believe

that it is particularly applicable to the circumstances of the instant case:

> "Case comes up on motion of a creditor for dismissal because of the failure of the debtor to make a bona fide offer of composition or extension of his debts. Motion granted.
>
> The bank contends in its first ground for dismissal that this cause was never pending under Section 75 (S), 48 Stat. 1289, 11 U.S.C.A., para. 203 (s) and note. By the specific terms of Section 75, Subsection (S), a positive act is required on the part of the debtor to initiate proceedings under (S): 'Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt.'
>
> It is apparent that this cause could not be pending under that Subsection unless and until the debtor amended his petition asking to be adjudged a bankrupt. In the instant case the debtor exhausted his remedy under all prior subsections of Section 75 but took no steps to bring his case within the terms of (S). Without the required positive action on the part of the debtor, the court must conclude that this proceeding was never pending under former Subsection (S).
>
> It is further contended by the bank in its first ground that these proceedings were not dismissed because of the Supreme Court holding Subsection (S) to be unconstitutional. This issue must be determined from the record. As hereinbefore held, this cause was never pending under the subsection determined by the Supreme Court to be unconstitutional, and that fact has some bearing. However, any final doubt must be dissolved by the order itself, which held: ' * * * *and the Court being fully*

advised that the Commissioner is unable to reach a conciliation agreement of composition or extension does hereby dismiss said proceedings.'

This order of dismissal, acquiesced in by counsel for the debtor, leaves no room for doubt as to the ground of the dismissal; it was the failure to reach a conciliation agreement of composition or extension.

This being true, there was no valid ground for reinstatement of the case. Reinstatement is provided for in Section 75, Subsection (S) (5), 11 U.S.C.A., para. 203 (S) (5), reading in part as follows: 'This Act (title) shall be held to apply to all existing cases now pending in any Federal court, under this Act (title), as well as to future cases; and all cases that have been dismissed by a conciliation commissioner, referee, or court because of the Supreme Court decision holding the former Subsection (S) unconstitutional, shall be promptly reinstated, without any additional filing fee or charges.'

It is apparent from the record that this case was not so dismissed, neither can it be reinstated under the terms of the act upon that ground.

The second ground for dismissal urged by the bank is that no proceedings are now pending herein under Section 75, Subsection (S) of the amended act, 11 U.S.C.A., para. 203(s).

It is sufficient to say that no action has been taken by the debtor to amend his petition in order to bring himself within the provisions of that subsection, and for this reason this cause is not now pending under the subsection in question." (Italics ours)

It has also been held by the Circuit Court of Appeals for the Eighth District in *McWilliams v. Blackard,* 96 F. 2d 43, that even though the District Court erroneously held that Section 75 as amended was unconstitutional, in the absence of an appeal, the decision of the District

Court is binding on the debtor. In that case a petition was filed on the 26th day of October, 1935. No plan was accepted. On November 13, 1936, a dismissal was ordered on the ground that Subsection (S) was unconstitutional. No appeal from that ruling was taken. The court said, at Page 45:

> "The suggestion that the judgment of this court did not become final because the debtor made no application to the Supreme Court for certiorari is so obviously without merit as to require no discussion. Had the debtor procured a writ of certiorari from the Supreme Court of the United States, and had that court reversed the decision of this court, the judgment would not have become final. Since no action was taken by the debtor to secure a reversal of the decision of this court, the judgment, whether right or wrong, became final and binding upon him. This court had the same power to determine the controversy between these parties on the former appeal as it has to determine their present controversy.
>
> 'Whatever may be the nature of a question presented for judicial determination—whether depending on Federal, general, or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed.' Mitchell v. First Nat. Bank of Chicago, 180 U.S. 471, 481; 21 S. Ct. 418, 422; 45 L.Ed. 627.
>
> 'Whenever the right and the duty of a court to exercise its jurisdiction depends upon the decision of a question it has power to hear and determine, its judgment, right or wrong, is binding upon the parties and those in privity with them.' (Foltz v. St. Louis & San Francisco Ry. Co., 8 Cir., 60 F. 316, 319; Thompson v. Terminal Shares, 8 Cir., 89 F. 2d 652, 655; Wilcons v. Penn. Mutual Life Ins. Co., 10 Cir., 91 F. 2d 417, 419. 'The power to de-

cide includes the power to decide erroneously.' Simonitsch v. Bruce, 8 Cir., 258 F. 331, 333; Jack v. Hood, 10 Cir., 39 F. 2d 584, 595.

'The contention of the appellee that the decision of this court requiring the lower court to dismiss his petition was not a determination of the controversy presented by the former appeal upon the merits is clearly unsound. Whether a judgment is based upon the determination of a question of law or of a question of fact makes no difference with respect to its finality or effectiveness. It is a final judgment in either event.' Fauntleroy v. Lum, 210 U.S. 230, 237; 28 S. Ct. 641; 52 L.Ed. 1039; The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25; 33 S. Ct. 410; 57 L.Ed. 716.

We are now convinced that the court below had no power to reinstate the petition of the appellee upon the theory that the decision of this court was not res adjudicata."

In the case of *In Re Archibald,* 14 F. Supp. 437, at Page 439, the original proceedings were dismissed because of the failure of the debtors to effect a composition. The original petition was filed prior to the 19th day of January, 1935, and dismissed on the 18th day of June, 1935. On the 13th day of January, 1936, the farmer debtor filed a second petition for composition or extension under Section 75. The district court dismissed the second proceedings, saying in part as follows:

"It thus appears that the farmer-debtor, having in 1935 instituted and carried to final termination and adjudication of dismissal a proceeding for composition and extension under Section 75 (A to R), as amended, 11 U.S.C.A. para. 203 (A to R), has now commenced and is seeking to maintain a second proceeding under Section 75 for composition and extension against the same creditors involved in the first proceeding.

This is a judicial proceeding authorized by Section 75, by which a farmer-debtor may seek and obtain, if he can, an extension agreement or composition agreement with his creditors confirmed by the order and judgment of the court, thus making it valid and binding.

The subject matter involved in such a proceeding is the obtaining of a composition and extension of the farmer-debtor's debts.

If the debtor obtains an acceptance of his proposition for settlement by a majority in number and amount of his creditors, including his lien creditors, and that is confirmed by the order and judgment of the court, it is binding upon all of his creditors.

The proceeding may result in a failure to obtain a composition and extension and in that case there would be a judgment of dismissal entered.

The effect of filing such petition and application is to suspend, for the time being, the right of any creditor to enforce his claim.

If, upon the failure of a proceeding and judgment of dismissal, the farmer-debtor may commence a second proceeding against the same creditors and again suspend the enforcement of all claims against him, there is no reason why he could not, upon failure of the second proceedings, commence a third proceeding, and so on ad infinitum, and thus indefinitely prevent his creditors from enforcing their claims against him.

The act, so construed, would clearly render it obnoxious to the Fourth and Fifth Amendments to the Constitution of the United States, as depriving his creditors of their property without due process of law and without just compensation.

It cannot be assumed that Congress intended such a result. The farmer-debtor, by the first proceed-

ing, had his day in court and the controversy between him and his creditors was adjudicated. I think the doctrine of res adjudicata applies."

The case of *In Re Henderson,* 100 F. 2d 820, at Page 821, is, we think, squarely in point with the position taken by the petitioner in the instant case. While the order denying the petition for reinstatement was based upon the finding that no good-faith effort to effect a composition or extension had been made, the reasoning supporting the order is of importance here.

In that case, the debtor filed a petition praying to be allowed to effect a composition under the provisions of Section 75. At the first meeting of creditors, a plan was proposed. No acceptances were obtained, no order was entered fixing a time within which a plan might be presented, and the matter lay dormant for sixty-one days; whereupon, the conciliation commissioner certified the facts to the district court who ordered dismissal without notice to the debtor. Seventy-four days later, the debtor filed an amended petition for adjudication under Section 75(A), and upon learning that the original petition had been dismissed, asked that the order of dismissal be set aside and the case reinstated. The district court denied the petition and the Circuit Court of Appeals affirmed the district court, saying in part as follows:

"At the first meeting the plan or offer was rejected. No order was entered fixing the time within which a plan might be presented and the matter laid dormant for 61 days; conciliation commissioner reported facts and moved for dismissal.

Court dismissed petition without notice. Thereafter and within 74 days after the first meeting appellant filed his amended petition under (S) and on learning that the original petition had been dismissed, asked to have the order of dismissal set aside.

In denying the petition for reinstatement, the court found that no good-faith effort to effect a composition or extension had been made, and that appellant was not entitled to the relief provided for in Section 75(S) of the Bankruptcy Act. Baxter v. Savings Bank of Utica, 5 Cir., 92 F. 2d 404.

Appellant challenges the action of the court on the ground that, in the absence of an order limiting the time within which he could present a plan for confirmation, he had a maximum of ninety days, under Paragraph 4 of Section 50 of the General Orders, 11 U.S.C.A. following Section 53, and that, since this time had not elapsed, the order of dismissal was prematurely entered. It may be questioned whether or not the debtor can make this contention, since it is implied in the General Orders that such time as is *allowed by the court will be on his application, and the absence of such allowance results from an absence of a request therefor; and for the further reason that he is charged with notice of the various steps taken in the proceeding, which includes the reports of the conciliation commissioner and the supervision conciliation commissioner.* Cf. Massey v. Farmers & Merchants Nat. Bank & Trust Co., 4 Cir., 94 F. 2d 526.

In the present case, the finding of the court on the lack of good faith is not questioned, either in the briefs or in the record. *The application to the court below for reinstatement of the petition was not that appellant be allowed to make a good-faith offer, but that he be allowed additional delay for the filing of a petition for adjudication under Subsection (S). There is no apparent intention or desire to effect a conciliation or extension but it appears that appellant's one purpose is to hinder and delay his creditors.*

It has been pointed out that the relief afforded in Subsection (S) is not an end in itself, but is ancillary to and in aid of the rehabilitation of distressed farmers, as contemplated under the preceding sub-

sections of Section 75. The constitutionality of the section is grounded upon the principle that proceedings for the conciliation of creditors and the composition and extension of debts are within the scope of the bankruptcy provision of the Constitution, U.S.C.A. Const. Art. I, para. 8, cl. 4. Such a proceeding may not be converted into a sham for the purpose of gaining whatever the petitioner wishes by way of procedural delays and hindrances to creditors, where no legitimate purpose of the act will be served. Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 400, 462; 57 S. Ct. 556; 81 L.Ed. 736; 112 A.L.R. 1455." (Italics ours).

Even though it might be clear that the District Court had erred in the dismissal of the petitioner's petition, yet it was incumbent upon the petitioner to appeal from the order of dismissal within the time fixed by law.

The District Court had jurisdiction of the petitioner and his property. The dismissal of his petition was an order within the power of the court to make. It has often been stated, "That the power to decide includes the power to decide erroneously".

The sole remedy of the petitioner, if he believed the order of dismissal to be erroneous, was by appeal, not by a collateral attack upon the validity of the order.

This Court so stated in *Union Joint Stock Land Bank v. Byerly,* 310 U.S. 1, 60 S.C. 773, in which case the district court erroneously, and in clear violation of Section 75, permitted the sheriff to hold a foreclosure sale in a state court proceedings.

Mr. Justice Roberts said at page 693 of the opinion:

"In view of the provisions of Subsection (O), it was error for the District Court, in the absence of the preliminary steps required by that subsection, to permit the sheriff to hold the sale. *But the court*

had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order. The State court and its officer, the sheriff, were entitled, in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale. *The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable, but not void, and was not to be disregarded or attacked collaterally in the State court."* (Italics ours)

V. The Appeal from the Order of the District Court Was Not Taken Within the Time Prescribed by the Bankruptcy Act.

A. The time for appeal from the order of March 17, 1936, expired within 40 days after entry thereof.

Although the Circuit Court of Appeals did not base its decision upon the ground that an appeal did not lie because of the lapse of time, and only referred briefly to that phase of the matter (Opinion C.C.A. R. 44), we desire to call the subject to this Court's attention.

The petitioner's appeal was in part from the order of the District Court, dated March 17, 1936, dismissing the petition under Section 75. (Amended notice of appeal, R. 30).

We think it is quite obvious that the time within which an appeal might be taken from that order has long since expired.

Although in petitioner's "amended petition for reinstatement of petition", (R. 13, 17), it is alleged (R. 16,

para. 3) that the proceedings were dismissed without notice, there is no allegation in the record that the petitioner did not have actual notice of the entry of the order of dismissal.

But it is submitted by counsel for the respondents that no notice of the entry of an order in a bankruptcy matter need be served in order to start the time running within which an appeal may be taken. Section 25 (A), Bankruptcy Act, Title 11 U.S.C.A. 48 (A), provides:

> "Appeals under this title to the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service, or, if such notice be not served and filed, then within forty days from such entry."

The language contained in the quoted section cannot be misconstrued. If notice of entry of the order of judgment is given, the appeal must be taken within thirty days. If no notice is given, the appeal must be taken within forty days from the entry of the order. It follows, therefore, that the time within which an appeal might be taken from the order of March 17, 1936 has long since expired.

B. The appeal from the order of April 16, 1940, in effect seeks a review of the prior order and should be dismissed.

The respondents further contend that the appeal from the order of April 16, 1940, is, in effect, an appeal from the order of March 17, 1936, and for that reason, if for no other, should be dismissed. The petitioner moved the

District Court for a rehearing of the order of March 17, 1936, and for vacation of that order. His motion was denied and this appeal is taken from the order denying that motion.

The petitioner seeks to avoid the statute fixing the time within which an appeal may be taken, by moving the vacation of an order after the time for appeal has expired and then appealing from the order denying the motion to vacate.

It has frequently been held that such an appeal is subject to dismissal.

In *Mintz v. Lester,* 95 F. 2d 590, the District Court dismissed the proceedings under Section 75 of the Bankruptcy Act upon the motion of creditors on December 20, 1935. On April 21, 1937, the bankrupt filed a motion to reinstate the proceedings. On May 10, 1937, the trial court entered its order denying the motion to reinstate, from which order the bankrupt appealed.

The appellate court dismissed the appeal, saying at Page 591 of the opinion (last paragraph on that page):

> "Likewise the order of May 10, 1937, was not appealable. The petition to reinstate in effect sought a reconsideration of the court's action in dismissing the proceedings by its order of December 20, 1935, a rehearing of the motion to dismiss by a motion filed long after the time for appealing from such order had expired. A party may not avoid the effect of the statute limiting the time within which an appeal may be taken from an order, by filing after the time for appeal from such order has expired, a motion for rehearing or a motion to vacate the order denying the motion for rehearing or the motion to vacate."

The facts contained in the cited case are identical in practical effect with the facts in the case at bar.

Marcy v. Miller, 95 F. 2d 611, was a case that also arose under Section 75 of the Bankruptcy Act. In that case, the District Court entered an order on December 21, 1936, withdrawing certain lands from the proceedings. No appeal from that order was taken. On May 20, 1937, the bankrupt filed a motion to restore the jurisdiction of the District Court over those lands. The motion was denied and an appeal allowed by the District Court.

The appellate court held that the appeal should be dismissed, leave to appeal not having been obtained from the appellate court, and also, said on Page 612 (last paragraph of the opinion):

> "The appeal is footless for another reason. It is expressly taken from the order of May 27, 1937, overruling the motion to reinstate; but the errors assigned do not challenge that order. The assigned errors are directed to the order of December 21, 1936, withdrawing the lands covered by the mortgages from the proceedings. The time within which an appeal could be taken from that order had long since expired and it had become res adjudicata when this appeal was prayed and allowed. (An order made in a proceeding in bankruptcy may be reviewed only on appeal from it, not on appeal expressly taken from a subsequent order entered after the time allowed for appeal from the former order has expired)."

To the same effect is *In Re Irving-Austin Building Corporation,* 96 F. 2d 905, where the court said, at Page 906:

> "An order in a bankruptcy proceedings, from which appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. Nor may a party refrain from direct attack by motion to modify or by appeal from an order and later collaterally attack the same by an appeal from a later order, in which the court

overrules an objection attempting to raise a question disposed of by the previous order."

The respondents submit that the language of the cases cited is controlling, and that the decision of the Circuit Court of Appeals should be affirmed, if for no other reason.

CONCLUSION

It cannot reasonably be said that Congress intended the benefits of Section 75 to be forced upon a debtor unwilling to accept them, or that the Act could be employed as a shield behind which a debtor acting in bad faith could hide to the injury of his creditors, and in plain violation of the terms of the Act itself.

The petitioner instituted the proceedings under Section 75, but for some reason of his own, abandoned them and elected to try out the issues involved in the state courts. Having so elected, we contend he should be left to abide by the result of the state court actions.

To reinstate the petitioner's proceedings under Section 75, nearly four years after those proceedings were dismissed for cause, would be to reward a careless and negligent debtor who has used the process of the bankruptcy courts merely for the purpose of delay.

We respectfully submit that the decisions of the District Court and of the Circuit Court of Appeals were correct and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. ARTHUR MORAN,
Attorney for Respondents.